161

(1) Supreme Court, U.S.
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In The

Supreme Court of the United States

DON H. HAYCOCK,

Petitioner,

v.

NORMAN L. EPSTEIN, Justice of the Second Appellate District, STEVEN C. SUZUKAWA, Justice of the Second Appellate District, NORA M. MANELLA, Justice of the Second Appellate District, and STATE OF CALIFORNIA,

Respondents.

On Petition For A Writ Of Certiorari To The Ninth Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

DON H. HAYCOCK, Attorney in pro se
DON H. HAYCOCK AND ASSOCIATES
7321 Westlawn Avenue
Los Angeles, California 90045
(310) 641-3921
dulcilobo@yahoo.com

QUESTIONS PRESENTED

I.

Are Respondents, California Second Appellate District Justices, protected by Judicial Immunity from intentionally rejecting an undisputed, California one-year statute-of-limitations defense, by fabricating an equitable defense that they based on false, non-existent facts they fabricated; an equitable defense not supported by any California case or statutory law; and, an equitable defense that California's Constitution forbids its appellate courts justices to render?

II.

Has Petitioner been denied due process under the Fourteenth Amendment by the California Courts, the Federal District Court and the Ninth Circuit Court of Appeals, for the refusal of all these courts to reject the *equitable defense* ruling presented in Question No. I, by California Appellate Justices, and affirm a decision based on the facts and California's one-year statute of limitations, as Petitioner has requested?

III.

Will the United States Supreme Court institute California's one-year statute of limitations on Respondents, California Second Appellate District Justices, and the State of California; and, find Petitioner the prevailing party and entitled to damages against each Respondent Justices and the State of California?

QUESTIONS PRESENTED – Continued

IV.

Has California waived immunity from Eleventh Amendment protection, under its Government Code, section 815.2, for the tortious actions of its judicial officers?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION AND DUE PROCESS	1
CONSTITUTIONAL PROVISION INVOLVED	3
STATEMENT OF CASE	4
Appellate Justices' Equitable Decisions Are Void For Their Total Lack Of Jurisdiction Under California's Constitution	6
The equity defense by Second District Appellate Justices Epstein, Suzukawa and Manella is entirely their fabrication of facts and law	10
California Appellate Justices' Flawed Contention	11
California Appellate Justices' Further Acknowledgment of the Statute of Limitations Violation	15
The State of California is Liable For Damages For Torts of Its Judicial Officers	19
REASONS FOR GRANTING WRIT OF CERTIORARI	20
CONCLUSION AND REQUESTED DECISION	22

TABLE OF CONTENTS – Continued

Page

APPENDIX

Ninth Circuit Opinion ..... App. 1

Ninth Circuit Order ..... App. 2

Ninth Circuit Order ..... App. 4

U.S. District Court Judgment ..... App. 5

Report and Recommendation ..... App. 6

California Supreme Court Order ..... App. 14

California Court of Appeal Opinion ..... App. 15

Ninth Circuit Order ..... App. 34

TABLE OF AUTHORITIES

Page

CASES

Bellows v. Aliquot, Inc., 25 Cal.App.4th 426 (1944) 16

Beswick v. Churchill Co., 21 C.A. 721 (1913) 9

Bradley v. Fisher, 80 U.S. 335, 20 L.Ed. 646 (1872) 12, 13

Brock v. Superior Court, 29 Cal.2d 629 (1947) 7

Cain v. French, 143 P. 67 (1914) 9

California Casualty Ins. Co. v. Superior Court, 46 Cal.App.4th 114 (1995) 7

Giltow v. New York, 268 U.S. 642 (1925) 1

Clarke v. Fiedler, 44 Cal.App.2d 838 (1941) 7

Goldberg v. Kelly, 397 U.S. 254 (1971) 1, 2

Green v. Green, 215 Cal.App.2d 31 (1963) 8

Kohler v. Interstate Brand Corp., 103 Cal.App.4th 1096 (2002) 7

Lantzy v. Centex Homes, 31 Cal.4th 363 (2003) 6, 10, 11, 21

MacDonald v. Joslyn, 274 Cal.App.2d 282 (1969) 16

Mireles v. Waco, 502 U.S. 9, 112 S.Ct. 286, 116 L.Ed.2d 9 (1991) 12

Muskrat v. United States, 219 U.S. 346 (1911) 3

NAACP v. Button, 371 U.S. 415 (1963) 1

TABLE OF AUTHORITIES – Continued

Page

Oldenkott v. American Electric, 17 Cal.App.4th 198 (1971) 9

Pierson v. Ray, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967) 12

Pipe & Supply Co. v. Superior Court, 9 Cal.App.2d 769 (1936) 8

Rankin v. Howard, 633 F.2d 844 (1980) 9

Regents of the University of California v. Doe, 519 U.S. 425, 116 S. Ct. 2522, 135 L.Ed.2d 1047 (1997) 20

REO Broadcasting Consultants v. Martin, 69 Cal.App.4th 489 (1999) 8

Rowland v. Rowland, 24 C. 59 (1864) 8

Sagonowsky v. Moore, 64 Cal.App.4th 122 (1998) 16

Sequoia Pine Mills v. Superior Court 258 Cal.App.2d 65 (1968) 8

Starvopluos v. Superior Court, 141 Cal.App.4th 190 (2006) 17

Stump v. Sparkman, 435 U.S. 349, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978) 12, 13, 14

Tanningsen v. Old Fellows Cemetery Assn., 60 Cal.App. 568 (1923) 8

Weller v. Chavarria, 258 Cal.App.2d 65 (1965) 8

Williams v. Williams, 80 Cal.App.2d 28 (1947) 9

TABLE OF AUTHORITIES – Continued

Page

Yuba County v. North American Consolidated Gold Mining Co., 12 Cal.App. 121 (1909) 8

Zeller v. Rankin, 451 U.S. 939, 101 S.Ct. 2020, 68 L.Ed.2d 326 (1965) 9, 14

UNITED STATES CONSTITUTION

Amendment V 1, 2

Amendment XIV 1, 2, 3

Article III 2

UNITED STATES CODE

Title 18, Part I, Crimes (Criminal Code) 11

CALIFORNIA CONSTITUTION

Article IV, Section 11 .....6, 7

Article I, Section 26 6

CALIFORNIA CODES

Code of Civil Procedure, § 340 .....5, 16, 17

Appellate Rule 25 6

Government Code 68061 7

California Penal Code, § 134 .....7, 11

Code of Civil Procedure, § 312 18

California Government Code, § 815.2 19

OPINIONS BELOW

The nonpublished opinion and decision of the Second District Court of Appeals for the State of California, Central District, affirming the judgment of the Los Angeles Superior Court rendered against Petitioner, is Appendix App. 1-14. The order of the California Supreme Court denying Petitioner's petition for review of this Court of Appeal decision is App. 15. The unpublished opinion of the Federal District Court, Central California District, is App. 16-22. Decisions of the Ninth Circuit Court of Appeals, Central District of California, are App. 23-27.

JURISDICTION AND DUE PROCESS

The Fifth and Fourteenth Amendments to the United States Constitution grant the right for citizens to petition the United States Supreme Court for redress from the unlawful deprivation of property. *NAACP v. Button*, 371 U.S. 415 (1963).

In *Giltow v. New York*, 268 U.S. 642 (1925), the United States Supreme Court ruled that the "due process clause" of the Fourteenth Amendment prohibits any state from depriving "any person of life, liberty, *or property*, without 'due process of law.'"

The United States Supreme Court in *Goldberg v. Kelly*, 397 U.S. 254 (1971), addressed what constitutes "property" within the "due process" clause of the Fourteenth Amendment.

New York suspended Kelly from its welfare program without a formal hearing that was mandated by New York's Constitution. Kelly protested that the lack of a formal hearing violated the "due process" protection that a formal hearing accorded. The United States Supreme Court agreed and ruled that "due process" under the Fifth and Fourteenth Amendments mandated a formal hearing before suspension, " . . . *that required a full disclosure of the evidence relied on to support the order of suspension*;" . . . and, "non-partiality of the decision maker." (Pages 266-271)

Article III of the United States Constitution prohibits federal courts hearing cases wherein there is no controversy between the parties. (*Section 2, Clause 1*) The Ninth Circuit and District Court's peremptory dismissals of this lawsuit is prohibited by Article III because there clearly is controversy that should have been addressed and judicially resolved.

Respondents, California Second Appellate District Justices' contention that they had "absolute judicial immunity" to reject the statute of limitations defense by their fabricated equity decision is patently false. Appellate decisions of the United States Supreme Court, the Ninth Circuit, and California's Supreme and Appellate Courts – can, and do, impose liability on judicial officers whose decisions exceed the judicial jurisdiction conferred on them. California's Constitution prohibits its appellate justices issuing any equity decision, including those of record and based on truthful facts.

Respondents California Appellate Justices *had no jurisdiction* to render their equity decision based on non-existent facts and fabricated law.

Under *Muskrat v. United States*, 219 U.S. 346 (1911), the United States Supreme Court reaffirmed the Constitutional principle that "case and controversy" must first be determined before a court can rule on the merits. A peremptory dismissal without consideration of facts and law is an *Edict* and foreign to America's jurisprudence.

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment, Section 1, to the United States Constitution provides:

> "All citizens born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; or deny to any person within its jurisdiction the equal protections of the laws."

STATEMENT OF CASE

Two years after condo owner and attorney Hugh McMullen ("McMullen"), had not paid monthly association dues to Doverwood Townhome Owners Association ("Doverwood"), it retained S.B.S. Trustee Network ("S.B.S.") to sale his condo. McMullen aborted the sale by conveying shares of his condo to parties in bankruptcy. Doverwood then retained petitioner and attorney Haycock who sued McMullen for breach of contract, filed a *lis pendens*, and proved McMullen's conveyances lacked consideration, contrary to his declaration under oath. The condo was sold and the lawsuit was voluntarily dismissed by Haycock with prejudice on January 12, 2001, who then released the surplus from the sale to McMullen.

On March 24, 2001 McMullen's motion for attorney fees was granted. Doverwood filed notice to appeal the award on April 18, 2002, and included in that notice, the intention to appeal the voluntary dismissal, but that was abandoned after determining it could not be appealed. The California Appellate Court acknowledged its abandonment on July 31, 2002.

On September 15, 2003, thirty-one (31) months after the lawsuit was dismissed, McMullen filed this malicious prosecution lawsuit against Doverwood and Haycock in the Superior Court of Judge Gerald Rosenberg, Judge Rubin's successor. On December 15, 2003 Haycock was served, and *demurrer*, proving the complaint was barred by California's one-year statute

of limitations under California Code of Civil Procedure, section 340. Doverwood had been dismissed. Judge Rosenberg rejected the one-year statute of limitations defense, and entered judgment against Petitioner Haycock.

Respondents, California Second District Appellate Justices Norman Epstein, Seven Suzukawa and Manella confirmed McMullen's violation of the one-year limitation under section 340. Then they ruled the one-year limitations *was tolled* by an *equitable defense* they created for McMullen, by falsely stating, in their *equitable decision*, that McMullen, *believed*: that the one-year statute of limitation was tolled by "appeal of the voluntary dismissal." And, based on these fabrications, Haycock was equitably estopped to assert the one-year limitation of section 340. (The voluntary dismissal was never appealed.)

To support their fabricated *equitable decision* defense for McMullen, they stated: (*See*: Page 6 of California Respondents Justices' decision in Appendix.)

> "Although Haycock is correct that no appeal maybe taken from a voluntary dismissal of an action, that is not the controlling factor. When Haycock filed the *notice of Appeal* from the *voluntary dismissal*, he caused McMullen to believe that the limitations period was tolled while the appeal was pending. Haycock, accordingly, is *equitably estopped* to "plead the very delay caused by his course of conduct as a defense to the action when

> brought. [citations] *Lantzy v. Centex Homes*, 31 Cal.4th 363 (2003)."

There is no record, claim or expression by McMullen in any of the Superior Court Records from Judge Rosenberg's court; or in the appellate briefs before these defendant Justices – *that McMullen believed the voluntary dismissal had been appealed; and, that he believed this appeal tolled the one-year statute of limitations.*

Then Respondents Justices Epstein, Suzukawa and Manella denied Haycock's Rule 25 Appellate Motion for Reconsideration, that proved their *equitable estoppel* defense was based on facts they fabricated to sustain the judgment for McMullen. California's Constitution, Article IV, Section 11, prohibits its appellate courts rendering equitable decisions *even* when supported by facts that are true, facts that occurred in the trial court, and facts that are proved by the trial court records. This section mandates:

> " . . . (a) courts of appeal have appellate jurisdiction when superior courts have original jurisdiction. . . ." California's Constitution, Article 1, Section 26, proclaims that all its mandates are either: "mandatory and prohibitory."

Appellate Justices' Equitable Decisions Are Void For Their Total Lack Of Jurisdiction Under California's Constitution

The California Constitution, Article IV, Section 11, prohibits Appellate Courts issuing, reviewing, and

affirming decisions in equity, a jurisdiction exclusively designated to trial courts. This *equitable estoppel* decision was never raised in the trial court and is based on Respondents, Appellate Justices Epstein, Suzukawa and Manella's fabrications. It is a fraud on the California Judiciary, a violation of California's Penal Code, section 134 – and is void.

"*The jurisdiction of the [California] District Court of Appeals is limited to questions of law.*" *Clarke v. Fiedler,* 44 Cal.App.2d 838, 841 (1941).

"Matters not presented in the trial court cannot be made part of the trial record [and] *cannot be considered by the Appellate Court.*" *Brock v. Superior Court,* 29 Cal.2d 629, 633 (1947). (A California Supreme Court decision, applying Art. IV, Sec. 11, of California's Constitution).

"The appellate court *may not* rely on an issue that was not briefed. The parties must be given the opportunity to submit supplemental briefing." "*California Government Code, section 68061.*" Cited in: *California Casualty Ins. Co. v. Superior Court,* 46 Cal.App.4th 114 (1995).

"[In the Appellate Court] the parties' arguments must be confined to the evidence in the record, *and matter outside the record will not be considered.*" *Kohler v. Interstate Brand Corp.,* 103 Cal.App.4th 1096, 1099 (2002).

"Points raised for the first time in the appellant's brief will not be considered, because the respondent

has not been given a chance to respond." *REO Broadcasting Consultants v. Martin,* 69 Cal.App.4th 489, 495 (1999). "Orders made by a court which has no jurisdiction of subject matter jurisdiction before it are void. *Pipe & Supply Co. v. Superior Court,* 9 Cal.App.2d 769, 771 (1936).

"*Proceedings outside the authority of the court . . . are utterly void.*" *Tunningsen v. Old Fellows Cemetery Assn.,* 60 Cal.App. 568, 571 (1923).

"Statements of alleged facts in the briefs on appeal *which are not contained* in the trial court record, and never called to the attention of the trial court *will be disregarded by the court of appeals.*" *Green v. Green,* 215 Cal.App.2d 31, 32 (1963); *Weller v. Chavarria,* 258 Cal.App.2d 65, 84 (1965); *Sequoia Pine Mills v. Superior Court,* 258 Cal.App.2d 65, 69 (1968).

"Where the appellate court has no jurisdiction to determine the merits of a suit in equity, it has no jurisdiction to entertain an appeal from a judgement or order therein [of an equitable decision], whether involving the merits or not." *Yuba County v. North American Consolidated Gold Mining Co.,* 12 Cal.App. 121, 122 (1909).

" . . . , an order obtained upon a false suggestion is not the order of the court and may be treated as a nullity." *Rowland v. Rowland,* 24 C. 59 (1864).

"An appellate court is never justified in substituting its discretion to that of the trial court, and

its power is limited to [a] determination of whether there has been such an abuse of discretion that it has resulted in a miscarriage of justice." *Williams v. Williams,* 80 Cal.App.2d 28, 30 (1947).

"*In reaching a decision on appeal, an appellate court is governed by the record; [and] will not consider facts having no support in the record;* [and] will disregard statements of such facts set forth in the brief." (*Emphasis added*). *Oldenkott v. American Electric,* 17 Cal.App.4th 198, 207 (1971).

When a judge knows that he lacks jurisdiction, or acts in the face of clearly valid statutes expressly depriving him of jurisdiction, judicial immunity is lost. Rankin v. Howard, 633 F.2d 844, cert. denied (1980). *Zeller v. Rankin,* 451 U.S. 939, 101 S.Ct. 2020, 68 L.Ed.2d 326 (1965).

"Under California's Constitution a District Court of Appeals has no jurisdiction of a suit in equity." *Beswick v. Churchill Co.,* 21 C.A. 721, 722 (1913).

"Where District Court of Appeals affirmed a decree in equity, of which it had no direct appellate jurisdiction, the judgment will be vacated and the case transferred to the Supreme Court . . . " *Cain v. French,* 143 P. 67, 68 (1914).

The equity defense by Second District Appellate Justices Epstein, Suzukawa and Manella is entirely their fabrication of facts and law

To conclusively prove their fabrications, Petitioner Haycock compiled complete sets of all the documents from the trial court, consisting of 352 pages, and provided sets to California Appellate Justices' attorneys, Trial Judge Rosenberg, and, Federal District Judge Florence-Marie Cooper. No where within these documents is there any mention of the following facts on which California Appellate Justices based their *equity* defense:

> " . . . the notice of appeal from the voluntary dismissal [that] caused McMullen [Plaintiff] to believe the limitation period was tolled while 'the appeal' was pending . . . "

Moreover, *nowhere* in *Lantzy v. Centex Homes* is the following, false and self-serving quotation that these Appellate Justices falsely attribute to *Lantzy* to support of their fabrication. To wit: "*plead the very delay caused by his course of conduct as a defense to the action when brought.*"

The reasons for their fabrications are obvious and outrageous: These Appellate Justices could not locate any law wherein an *equity* defense – at the appellate level – overruled a statute of limitations violation. So they fabricated the *Lantzy* decision. In *Lantzy*, the trial court denied the *equity* defense, and the California Supreme court affirmed the trial

court's denial. Specifically, *Lantzy v. Centex Homes* ruled that the *equity* defense, asserted by *Lantzy* – *did not extend the statute of limitations.* The California Supreme Court in *Lantzy* ruled the 10-year statute of limitations *could not be extended,* ruling:

> "Hence, plaintiffs have pled no facts indicating that defendants' conduct directly prevented them from filing their suit on time . . . plaintiffs have failed to plead facts that would equitably estop defendants from asserting this limitations period . . . " (Page 673)

California Appellate Justices' *equity* defense is an *EDICT* imposed without facts, law or jurisdiction to render *any equity decision.* It is void and subjects California Appellate Justices to personal liability. *A decision they had no jurisdiction to make.*

The fabrications of Justices Epstein, Suzukawa and Manella are criminal acts under the California Criminal Code, section 134, Preparing False Evidence; and, Title 18, Part I Crimes, of the United States Criminal Code that also makes the preparation, and production, of false evidence a felony.

California Appellate Justices' Flawed Contention

Respondents, California Appellate Justices' claim to have *absolute* and *unqualified immunity* for their fabricated *equity* defense. They repeatedly and singularly expressed this mistaken contention to the

Federal District Court and Ninth Circuit Court of Appeals as their defense. To wit:

> "Judicial Officers are immune from suit because they enjoy *absolute* and *unqualified* immunity. The U.S. Supreme Court established the rule that judges are immune from civil suits arising out of their judicial functions. *Mireles v. Waco*, 502 U.S. 9, 11, 112 S.Ct. 286, 116 L.Ed.2d 9 (1991); *Bradley v. Fischer*, 80 U.S. 335, 346, 20 L.Ed. 646; *Pierson v. Ray*, 386 U.S. 547, 554, 87 S.Ct. 1213, 18 L.Ed.2d 288, 294. And, *Stump v. Sparkman*, 435 U.S. 349, 362, 98 S.Ct. 1099 1107, 55 L.Ed.2d 331, 342." (Page 7 of California Appellate Justices' "Brief of Appellee").

Although, the cases cited *do not support their contention,* the Federal District Court's order peremptorily affirmed this contention. The Ninth Circuit adopted and approved the District Court's affirmation.

"Judicial immunity only protects judges for their decisions, when they have jurisdiction over the parties and jurisdiction to rule on the facts and law on the matter before them . . . ," as *Bradley v. Fischer*; *Stump v. Sparkman*, and the other cases cited so hold. Personal liability can be imposed on a judge, for "judicial functions" wherein the judge lacked jurisdiction over either the parties, or his decision exceeded the jurisdiction bestowed upon the court, as

expressed in *Stump*, that adopted *Bradley*, the most quoted decision on this issue.

Stump v. Sparkman evolved from an Indiana circuit court of general jurisdiction wherein Judge Stump ordered sterilization of a 15 year-old girl at her mother's request, but without her knowledge. After she married, and learned of her sterility, she sued Judge Stump and her mother in federal district court in Indiana. This court ruled that no federal action would lie against Stump because he had "absolute immunity."

The Court of Appeals (Seventh District) reversed, holding that the "critical issue" *was whether Stump acted within his jurisdiction*, and ruled he had not and was without the protection of judicial immunity due to: " . . . his failure to comply with elementary principles of procedural due process."

The United States Supreme Court reversed, ruling Stump had judicial immunity because Indiana law vested Stump, who practiced in an Indiana court of general jurisdiction, with the power to entertain and act upon the petition for sterilization even though his approval of the petition was in error. The court stated:

> "A distinction must be here observed between *excess of jurisdiction* and the *clear absence of jurisdiction* over the subject matter. *Where there is clearly no jurisdiction over the subject matter any authority exercised is an usurped authority, and for the exercise of*

> *such authority, when want of authority is known to the judge, no excuse is permissible.*" (Emphasis added, Pages 351-352)

The Court cited Indiana Code, section 16-8-4-2 that permitted parents to consent to surgery of a minor. Three of the Justices found Stump did not have judicial immunity.

Following *Stump*, the U.S. Supreme Court ruled: "When a judge knows that he lacks jurisdiction, or acts in the face of clearly valid statutes expressly depriving him of jurisdiction, judicial immunity is lost." *Zeller v. Rankin*, 41 U.S. 939, 10 S.Ct. 2020, 68 L.Ed.2d 326 (1965).

Under California's Constitution, and confirming case law, Respondents Appellate Justices had jurisdiction *only* to find that the trial court judgment violated California's one-year statute of limitations – which they so found. Then, their lawful and ethical duty, as Appellate Justices, was to set aside the judgment because their jurisdiction had terminated; they lacked authority to make any further rulings. If an *equity* decision were to be considered – California's Constitution mandates the case be remanded to the trial court – the only court having jurisdiction to render *equity* decisions. California Respondents Appellate Justices: had *no jurisdiction* to impose an *equity* defense for McMullen; they had *no jurisdiction* to clandestinely create an *equity* defense and refuse Appellant's request, and Constitutional right, to respond to this defense; they had *no jurisdiction* to

create an equity defense based on fabricated facts and no law, or other legal authority; and, they had *no jurisdiction* to rule by *EDICT*.

Respondents California Appellate Justices ruling, if approved, would upend this country's Constitutional principles of *blind equality* under law; both substantive and procedural due process for all citizens; and, would condone the practice of judges injecting fabricated evidence and non-existent law into their judicial decisions to corruptly favor a litigant.

California Appellate Justices' Further Acknowledgment of the Statute of Limitations Violation

Notwithstanding Respondents California Appellate Justices having acknowledged violation of the one-year statute of limitations, they have included the following presentation in their decision. It is based on their false representation that the January 12, 2001 voluntary dismissal of the underlying lawsuit, by appellant, was appealed – and that extended the limitations period. *This did not happen.* Following are quotations from California Respondents Appellate Justices Decision – attempting to show the one-year statute of limitations violation was extended by a tolling of an appeal of the voluntary dismissal. Their statements are in parentheses; some statements have been underlined and italicized by Petitioner for emphasis. They state:

"A voluntary dismissal, even one with prejudice may be a favorable termination which will support an action for malicious prosecution." *See MacDonald v. Joslyn,* 274 Cal.App.2d 282, 289 (1969), in which a voluntary dismissal without prejudice was held to be a favorable termination and *Sagonowsky v. Moore,* 64 Cal.App.4th 122 (1998). On January 12, 2001, the Association (Doverwood Townhome Owners Assn.) dismissed the underlying action against McMullen with prejudice. (*On Page 4 of Decision.*) . . . At the time the statute of limitations for malicious prosecution was codified in former section 340, subdivision (3) (Stats. 1905, ch. 256, p. 232), which imposed a one-year limitations period "for injury to or for the death of one caused by the wrongful act or neglect of another. (*See Bellows v. Aliquot Associates, Inc.,* 25 Cal.App.4th 426, 429-430 (1944).)" (*On Page 6 of Decision*)

"On April 18, 2001, the Association (Doverwood) appealed from: (1) *its own voluntary dismissal of the underlying action under section 473*; (2) the March 15, 2001 order for [granting] attorney fees and costs; and (3) the December 15, 2000 order for discovery sanctions. On *July 31, 2002,* Division Two of this District: (1) affirmed the March 15, 2001 order for attorney fees and costs; (2) *concluded the appeal from the voluntary dismissal was abandoned*; and (3) determined that the sanction order was not subject to appellate review after the Association's voluntary dismissal of the action. (*Doverwood Townhome Owner's*

Assn. v. McMullen, July 31, 2002 [Order] B149685)" (*On Page 4 of Decision*)

"In 2002, however, the legislature amended former section 340, subdivision (3) and deleted the relevant phrase "or for injury to or for the death of one caused by the wrongful act or neglect of another." That provision was moved to section 335.1, the newly enacted two year limitations statute for actions for "injury to or for the death of an individual caused by the wrongful act of neglect of another." (*On Page 6 of Decision*)

"While this appeal was pending, Division Two of this District held that the two year limitations period of section 335.1 applied to malicious prosecution claims. (*Starvopluos v. Superior Court*, 141 Cal.App.4th 190 (2006).) We agree. Given that section 335.1 enlarged the limitations period for former section 340, subdivision (3), *it applies to claims that were not time barred when the statute took effect on January 1, 2003.*" (*On Page 6 of Decision*)

"We concluded that section 335.1's two-year limitations period applies to this case because, *as McMullen points out*, the *limitations period was tolled from April 18, 2001 when the association filed notice of appeal in the underlying action until November 22, 2002 when remittitur was issued.*" (*On Pages 6-7 of order*)

Appellate Justices fail to mention that *only the awarding* of "attorney fees and costs" was appealed – there was no appeal "*in the underlying action.*" Only

an appeal of the *voluntary* dismissal *without prejudice* – arguably – could toll the statute of limitations beyond January 12, 2001 by a possible, and voluntary, re-filing at a later date. However, a *dismissal with prejudice* cannot be re-filed at a later date. Respondents California Appellate Justices admitted, and acknowledged that *appeal of the voluntary dismissal was abandoned sometime before July 31, 2002.* Changing the voluntary dismissal from "with prejudice" to "without prejudice" *never occurred* – and neither Doverwood nor McMullen – could change the dismissal date of January 12, 2001. Under section 312, "Civil action, *without exception* can only be commenced within the period prescribed in this title, *after the cause of action shall have accrued.*" The right to an appeal accrued on January 12, 2001 and extended to January 11, 2002 – *and cannot be changed.* Again, Respondents California Appellate Justices engaging in a deceptive effort on behalf of a favored party.

It is appropriate to address California Appellate Justices' implication that Defendant in the underlying lawsuit, Hugh McMullen, was an innocent and unknowledgeable victim in need of Respondents California Appellate Justices' special deference and consideration. At that time, Hugh McMullen was a practicing attorney and active member of the California Bar. He was educated at both Stanford and Harvard, and believed to have received degrees from both Universities. (*See: Cal.Bar Website*) At the time

of this lawsuit, he was actively practicing law in California.

Petitioner Haycock's involvement was caused by the foreclosure trustee, of his client, Doverwood Townhome Owners Association refusing to sell McMullen's condo because McMullen conveyed interests in it to parties in federal bankruptcies, and claimed *under oath,* that *he received consideration* for these conveyances. The voluntary dismissal of January 12, 2001, occurred immediately after he answered a court ordered interrogatory by admitting *no consideration* was received for these conveyances – that contradicted his previous declaration. *Mr. McMullen always knew the current status of this lawsuit.* He knew *there was no notice of appeal* pending from the voluntary dismissal when he filed this lawsuit on September 15, 2003. And, he knew there was no appeal of the voluntary dismissal.

The State of California is Liable For Damages For Torts of Its Judicial Officers

The State of California has waived immunity from liability for tortious injuries caused by its employees under California Government Code Sec. 815.2 that provides:

> "(a) A public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have

> given rise to a cause of action against that employee or his personal representative.
>
> (b) Except as otherwise provided by statute, a public entity is not liable for injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability."

Regents of the University of California v. Doe, 519 U.S. 425, 116 S.Ct. 2522, 135 L.Ed.2d 1047 (1997).

REASONS FOR GRANTING WRIT OF CERTIORARI

This case reveals that some courts in California have declared their independence from the Constitutional mandates of both California's Constitution and the Constitution of the United States. Without exception, the facts supporting applicable law in this case have been presented to the Judges and Justices of these courts, only to be ignored. Their response, whether written, adopted or implied, is that Respondents Justices have "*absolute*" and "*unqualified*" immunity to disregard any facts, and Constitutional mandates, to support their equity decision. Consequently, this matter was destined for the United States Supreme Court to render a decision based on the law and the facts. Specifically:

1) Respondents California Appellate Justices' fabrication that, "*McMullen believed the voluntary dismissal had been appealed; and he believed this*

appeal tolled the one-year statute of limitations." (Page 5, Statement of Case)

These Justices, as have others, have been provided with *copies of all documents* from the trial court, a total of 352 pages, disproving this fabrication. Proof of this fabrication only requires reading the record. This fabrication never happened.

2) The fabrication that California's Supreme Court authorized Respondents Appellate Court Justices to render an equitable decision under *Lantzy v. Centex Homes*, 31 Cal.4th 363 (2003). (Page 5, Statement of Case)

Lantzy rejected an *equitable defense* first raised in the trial court – that had jurisdiction. The Supreme Court sustained the rejection of the equitable defense by the trial court.

3) Respondents Justices refused to acknowledge *they lack jurisdiction* – under California's Constitution and affirming case law – to render equitable decisions. (*See*: California Supreme Court and Appellate cases prohibiting equitable jurisdiction of Appellate Courts, on Pages 5, 6, 7 and 8 of Statement of Case)

Without an equity defense – California's one-year statute of limitations applies, and this lawsuit was barred *ab initio*.

However, the Federal District Court ignored these facts, adopting the "*absolute*" and "*unqualified*" standards. The Ninth Circuit summarily adopted the District Court's decision.

CONCLUSION AND REQUESTED DECISION

Petitioner respectfully requests this court deny Respondents California Appellate Justices Judicial Immunity under the United States Constitution, its Supreme Court decisions, and other legal authority cited by both parties, that prove total and complete lack of jurisdictions for their fabricated equity defense. And also find their decision in equity void *ab initio* by being in violation of California's one-year statute of limitations.

Respectfully submitted,

DON H. HAYCOCK, Attorney in pro se
DON H. HAYCOCK AND ASSOCIATES
7321 Westlawn Avenue
Los Angeles, California 90045
(310) 641-3921
dulcilobo@yahoo.com

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DON HARDING HAYCOCK, Esquire, Plaintiff-Appellant, v. NORMAN L. EPSTEIN, Justice of the Second Appellate District; et al., Defendants-Appellees.	No. 08-56150 D.C. No. 2:08-cv-01531-FMC Central District of California, Los Angeles ORDER (Filed Dec. 10, 2009)

Before: GOODWIN, RYMER and CLIFTON, Circuit Judges.

Don Harding Haycock appeals from the district court's dismissal of his civil rights complaint for lack of subject matter jurisdiction.

We have reviewed the parties' briefs, the record and the response to the court's September 18, 2009 order to show cause. The questions raised in this appeal are so insubstantial as not to require further argument. *See United States v. Hooton*, 693 F.2d 857, 858 (9th Cir. 1982) (per curiam) (stating standard).

Accordingly, we summarily affirm the district court's judgment.

All pending motions are denied as moot.

AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DON HARDING HAYCOCK, Esquire, Plaintiff-Appellant, v. NORMAN L. EPSTEIN, Justice of the Second Appellate District; et al., Defendants-Appellees.	No. 08-56150 D.C. No. 2:08-cv-01531-FMC Central District of California, Los Angeles ORDER (Filed Sep. 18, 2009)

Before: TASHIMA and N.R. SMITH, Circuit Judges.

Appellant's motion for an extension of time to file a motion for reconsideration of the court's August 4, 2009 order is granted.

The motion for reconsideration is denied. *See* 9th Cir. R. 27-10.

No motions for reconsideration, modification, or clarification of this order shall be filed or entertained.

A review of the record suggests that this appeal may be appropriate for summary disposition under Ninth Circuit Rule 3-6(b), *See United States v. Hooton*, 693 F.2d 857, 858 (9th Cir. 1982) (per curiam).

Within 21 days after the filing date of this order, appellant shall show cause why summary affirmance of the district court's judgment is not appropriate. A

response may be filed within 8 days after service of the memorandum.

If appellant does not comply with this order, this appeal will be automatically dismissed by the Clerk for failure to prosecute. *See* 9th Cir. R. 42-1.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DON HARDING HAYCOCK, Esquire, Plaintiff-Appellant, v. NORMAN L. EPSTEIN, Justice of the Second Appellate District; et al., Defendants-Appellees.	No. 08-56150 D.C. No. 2:08-cv-01531-FMC Central District of California, Los Angeles ORDER (Filed Aug. 4, 2009)

Before: Peter L. Shaw, Appellate Commissioner.

Appellant's motions for summary disposition of this appeal are denied. *See United States v. Hooton*, 693 F.2d 857, 858 (9th Cir. 1982) (per curiam) (stating standard).

Appellant's motions for an en banc hearing are rejected as untimely. *See* Fed. R. App. P. 35(c).

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

DON H. HAYCOCK, Plaintiff, v. HON. NORMAN L. EPSTEIN, et al., Defendants.	No. CV 08-01531 FMC (FFM) JUDGMENT (Filed Jun. 10, 2008)

Pursuant to the Order Adopting Findings, Conclusions and Recommendations of United States Magistrate Judge,

IT IS ADJUDGED that plaintiff takes nothing by his Complaint and that this action is dismissed with prejudice.

DATED: June 10, 2008

/s/ Florence-Marie Cooper
FLORENCE-MARIE COOPER
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

DON H. HAYCOCK, Plaintiff, v. NORMAN L. EPSTEIN, et al., Defendants.	)	No. CV 08-01531 FMC (FFM) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable Florence-Marie Cooper, United States District Judge, pursuant to the provisions of 28 U.S.C. § 636 and General Order 01-13 of the United States District Court for the Central District of California.

PROCEEDINGS

Plaintiff Don H. Haycock ("Plaintiff") commenced the instant action on March 5, 2008, claiming that his constitutional rights were violated by three state court appellate justices, a trial judge, and the State of California in a previous litigation proceeding. Plaintiff alleges that the defendant trial judge erroneously denied his motion for judgment NOV after the jury in that proceeding found him liable for malicious prosecution. Plaintiff contends that the defendant judge should have found that the claim in the prior

proceeding was barred by the limitations period. Plaintiff further alleges that, on appeal, the three defendant court of appeal justices erroneously held that Plaintiff was estopped from asserting the statute of limitations. Plaintiff claims that he suffered damages when the plaintiff in the prior proceeding executed on the judgment. Plaintiff makes no allegations against the State of California.

On March 27, 2008, this Court issued an order to show cause why the action should not be dismissed for lack of jurisdiction. That order stated, *inter alia*:

> "Given that there are no allegations against the State of California and that the claims against the three Justices of the California Court of Appeal and Superior Court Judge are barred by judicial immunity, plaintiff's complaint seems to be obviously frivolous. *See Forrester v. White*, 484 U.S. 219, 226-27, 108 S. Ct. 538, 98 L. Ed. 2d 555 (1988)."

The order provided Plaintiff with an opportunity to address the patent jurisdictional deficiencies of the complaint within 15 days. Although Plaintiff never responded to the order to show cause, the Court will treat the opposition to defendants' motion to dismiss (described below) as an equivalent response.

Also on March 27, 2008, defendants filed a motion to dismiss the complaint. The motion asserts that Plaintiff's claims are barred by the doctrine of absolute judicial immunity, the 11th Amendment to the

United States Constitution, the *Rooker-Feldman* doctrine, and Plaintiff's alleged lack of standing under Article Three of the United States Constitution. Plaintiff filed an opposition to the motion to dismiss on April 23, 2008. Plaintiff also lodged court documents from prior state court proceedings in support of his opposition. Defendants filed a reply on April 21, 2008. Plaintiff requested, and was granted, leave to file a rebuttal to defendants' reply.

Having reviewed the documents filed in connection with the motion, the Court deemed the matter appropriate for decision without oral hearing pursuant to Federal Rule of Civil Procedure 78. On April 25, 2008 the Court vacated the hearing date and took the motion under submission.

DISCUSSION

A. This Court Lacks Jurisdiction to Review the Rulings of the California Courts.

It is well established that a "United States District Court, as a court of original jurisdiction, has no authority to review the final determinations of a state court in judicial proceedings." *Worldwide Church of God v. McNair*, 805 F.2d 888, 890 (9th Cir. 1986); *see District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 476, 103 S. Ct. 1303, 75 L. Ed. 2d 206 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-16, 44 S. Ct. 149, 68 L. Ed. 362 (1923). Under this "*Rooker-Feldman*" doctrine, a district court lacks jurisdiction over a claim amounting to a

"*de facto* appeal" of a state court judgment, which "asserts as a legal wrong an allegedly erroneous decision by a state court, and seeks relief from a state court judgment based on that decision." *Noel v. Hall*, 341 F.3d 1148, 1163-64 (9th Cir. 2003). The proper court in which to obtain such review is the United States Supreme Court, by petition for writ of *certiorari*. *Feldman*, 460 U.S. at 476; 28 U.S.C. § 1257. "This doctrine applies even when the challenge to the state court decision involves federal constitutional issues." *Worldwide Church of God*, 805 F.2d at 891 (citations omitted).

Rooker-Feldman applies to "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280, 284, 125 S. Ct. 1517, 161 L. Ed. 2d 454 (2005); *see also Noel v. Hall*, 341 F.3d at 1163 (*Rooker-Feldman* applies: (1) where the federal plaintiff "complain[s] of harm caused by a state court judgment that directly withholds a benefit from (or imposes a detriment on) the federal plaintiff based on an allegedly erroneous ruling by that court;" or (2) where the federal plaintiff "complain[s] of a legal injury caused by a state court judgment, based on an allegedly erroneous legal ruling, in a case in which the federal plaintiff is one of the litigants").

Plaintiff alleges that the California trial judge erroneously denied his statutory defense to the

malicious prosecution action and that the California appellate justices erroneously affirmed the judgment against Plaintiff. Plaintiff seeks compensation from the judge and justices for the injury caused to him by that judgment. In his opposition, Plaintiff contends he does not seek review of the state courts' decisions, but simply compensation for the harm suffered thereby. (*See* Plaintiff's Opposition, pp. 14-15). But prior to awarding Plaintiff any compensation in this action, this Court would have to find that the state court judge and justices ruled erroneously. No matter how Plaintiff characterizes it, his attempt to obtain compensation for an allegedly erroneous decision constitutes an attack on that decision, and therefore constitutes the kind of *de facto* appeal *Rooker-Feldman* prohibits.

In his rebuttal, plaintiff argues that an exception to *Rooker-Feldman* applies for a party that had "no actual state court opportunity to litigate" the claim. However, that exception is not applicable here. Plaintiff fully litigated the prior claim at the trial and Court of Appeal level. Plaintiff's contention that the Court of Appeal, affirmed the judgment on a ground not asserted by any of the parties does not trigger the exception. Moreover, plaintiff was entitled to (and apparently did) file a request for rehearing in which he could (and apparently did) argue why the equitable estoppel found by the Court of Appeal was not appropriate. Having been given a full and fair opportunity to litigate the claim in state court, *Rooker-Feldman* precludes plaintiff from re-litigating that claim here.

B. Defendants Are Protected from this Suit by the Doctrine of Absolute Judicial Immunity.

Judicial officers, such as the individual defendants here, enjoy absolute and unqualified immunity for their judicial acts. *See Forrester v. White*, 484 U.S. 219, 226-27, 108 S. Ct. 538, 98 L. Ed. 2d 555 (1988). Among other things, judicial immunity protects "judicial independence by insulating judges from vexatious actions prosecuted by disgruntled litigants." *Id.* at 225.

Plaintiff acknowledges the doctrine of judicial immunity, but contends that the doctrine is not applicable to defendants herein because their erroneous rulings exceeded their jurisdiction, citing *Stump v. Sparkman*, 435 U.S. 349, 98 S. Ct. 1099, 55 L. Ed. 2d 331 (1978). However, *Stump* does not assist Plaintiff. In *Stump,* the United States Supreme Court held that "[a] judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he has acted in the "clear absence of all jurisdiction." *Id.* at 356-57. The Court cited *Bradley v. Fisher*, 80 U.S. 335, 20 L. Ed. 646, 13 Wall. 335 (1871), for the following illustration of the distinction: "if a probate judge, with jurisdiction over only wills and estates, should try a criminal case, he would be acting in the clear absence of jurisdiction and would not be immune from liability for his action; on the other hand, if the judge of a criminal court should convict a defendant of a nonexistent crime, he would merely be acting in excess of

jurisdiction and would be immune." *Id.* at 357 n.7 (quoting *Bradley,* 80 U.S. at 352). Plaintiff cannot credibly argue that the trial judge did not have subject matter jurisdiction over the malicious prosecution action or the three justices of the Court of Appeal did not have subject matter jurisdiction over Plaintiff's appeal of the unfavorable judgment. Hence, all the individual defendants are entitled to absolute judicial immunity.

C. None of the Defendants Is Subject to Suit in This Court

"[I]n the absence of consent a suit in which the State or one of its agencies or departments is named as the defendant is proscribed by the Eleventh Amendment. . . . This jurisdictional bar applies regardless of the nature of the relief sought," *Pennhurst State School & Hospital v. Halderman,* 465 U.S. 89, 100, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984) (citations omitted).

The courts of California are agencies of the state vested with the state's judicial power. *See* Cal. Const., Art. VI, § 1; *see also Greater Los Angeles Council on Deafness, Inc. v. Zolin,* 812 F.2d 1103, 1110 (9th Cir. 1987).

Thus, to the extent Plaintiff sues these individuals in their official capacities as state officials, the Eleventh Amendment bars Plaintiff's claims against these defendants in this Court. *See Pennhurst,* 465 U.S. at 101.

D. Remaining Defense

Given the foregoing, the Court need not address the additional defense of lack of standing.

CONCLUSION

Based on the foregoing, the Court finds that the Complaint fails to state a federal claim on which relief may be granted against any defendant. Since it does not appear to the Court that the pleading deficiencies in Plaintiff's complaint are capable of being cured by amendment, the Court is recommending that Plaintiff's complaint be dismissed without leave to amend.

RECOMMENDATION

For all the foregoing reasons, it is recommended that the Court issue an order: (1) approving and adopting this Report and Recommendation; and (2) granting defendants' Motions to Dismiss Plaintiff's complaint without leave to amend; and (3) directing that judgement be entered dismissing this action with prejudice.

DATED: May 6, 2008 /s/ FREDERICK F. MUMM
FREDERICK F. MUMM
United States
Magistrate Judge

Court of Appeal, Second Appellate District,
Div. 4 – No. B185187
S146658

IN THE SUPREME COURT OF CALIFORNIA

En Banc

HUGH S. MCMULLEN, Plaintiff and Respondent,

v.

DON H. HAYCOCK, Defendant and Appellant.

(Filed Nov. 1, 2006)

Petition for review DENIED.

GEORGE
Chief Justice

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FOUR

HUGH S. McMULLEN, Plaintiff and Respondent, v. DON H. HAYCOCK, Defendant and Appellant.	B185187 (Los Angeles County Super. Ct. No. SC078914) (Filed Aug. 16, 2006)

APPEAL from a judgment of the Superior Court of Los Angeles County, Gerald Rosenberg, Judge. Affirmed.

Don H. Haycock, in pro. per., for Defendant and Appellant.

Timothy G. Dallinger for Plaintiff and Respondent.

In this malicious prosecution action, we reject the defendant's contentions of error, including that the complaint was time-barred and that the trial court committed instructional error, and affirm the judgment for the plaintiff.

BACKGROUND

Plaintiff and respondent Hugh S. McMullen owned and occupied a condominium in the Doverwood Townhomes in Culver City since 1978. In 1998, McMullen suffered a debilitating stroke that required a month long stay in a rehabilitation facility and six or seven months of outpatient physical therapy. McMullen, an attorney, could not work for about one year after the stroke and, during that period, did not pay approximately $4,700 in assessments to the Doverwood Townhomes Owners Association (the Association). Although McMullen attempted to negotiate a payment plan, the Association demanded payment in full and in September 1999, scheduled a trustee's sale of his condominium.

McMullen retained a foreclosure consultant who advised him to delay the trustee's sale by quitclaiming a fractional interest in his condominium to a party in bankruptcy who would be identified, for a fee, by the consultant. Hoping to delay the sale long enough to cure his indebtedness, McMullen recorded a deed granting a 1/100th percent interest in his condominium to an unknown party in bankruptcy named Roberto Avila. After the trustee postponed the

foreclosure sale, the consultant selected another unknown party in bankruptcy, Spencer Enterprises, in whose favor McMullen recorded a deed granting a one-eighth interest in his condominium. The trustee again postponed the foreclosure sale, but McMullen was unable to pay the entire debt before the sale was held on January 18, 2000.

The trustee sold the property for $22,700, of which $13,759.97 was applied to extinguish McMullen's indebtedness to the Association, consisting of the unpaid assessments, interest, attorney fees, and costs. Although McMullen had recorded the two deeds, the title insurer issued a guarantee that prior to the trustee's sale, McMullen was the sole title-holder to the property. The trustee refused, however, to disburse the surplus funds to McMullen and deposited the funds with the superior court in an interpleader action. (Civ. Code, § 2924j.)

A. The Underlying Action Against McMullen

Defendant and appellant Don Haycock, who represented the trustee in the interpleader action, also represented the Association in the underlying action against McMullen. (*Doverwood Townhomes Owners Assn. v. McMullen* (Super. Ct. L.A. County, 2001, No. SC064332.) Haycock filed the Association's complaint in the underlying action against McMullen on November 8, 1999, seeking to recover as breach of contract damages the homeowner association fees, interest, attorney fees, and costs that were paid in

full, on or about the date that the complaint was served, from the proceeds of the private trustee's sale on January 18, 2000. The complaint also alleged a claim for fraudulent transfer of real property, based on the theory that McMullen, in order to delay the trustee's sale, had fraudulently conveyed a 1/10th interest in the condominium to a party in bankruptcy named Francisco Gomez. In his declaration that was attached as an exhibit to the complaint, however, Gomez rejected the quitclaim deed and denied any knowledge of the matter.[1] The complaint also sought to invalidate the quitclaim deed to Gomez as fraudulent and to quiet title to the condominium in McMullen, who no longer held title after the January 18, 2000 sale.

Despite the fact that McMullen's debt to the Association was fully paid as a result of the January 18, 2000 trustee's sale, Haycock continued to prosecute the underlying action for one year and propounded discovery requests concerning McMullen's allegedly fraudulent transfers and related matters that were rendered moot by the sale of the condominium. On December 15, 2000, the trial court granted McMullen $1,875 in discovery sanctions against the Association and Haycock.

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[1] In his testimony in the malicious prosecution trial, McMullen denied signing the Gomez deed and stated that he knew nothing about the deed until he was served with the Association's complaint.

On January 12, 2001, the Association voluntarily dismissed the underlying action against McMullen with prejudice. On March 15, 2001, the trial court awarded McMullen $44,185.33 in attorney fees under Civil Code section 1354, which permits the award of attorney fees to the prevailing party in actions to enforce covenants and restrictions in condominium and other community development projects. The trial court also ordered that the interpleaded funds be released to McMullen.

On April 18, 2001, the Association appealed from: (1) its own voluntary dismissal of the underlying action under section 473; (2) the March 15, 2001 order for attorney fees and costs; and (3) the December 15, 2000 order for discovery sanctions. On July 31, 2002, Division Two of this District: (1) affirmed the March 15, 2001 order for attorney fees and costs; (2) concluded that the appeal from the voluntary dismissal was abandoned by the Association's failure to assert any cognizable legal argument; and (3) determined that the sanction order was not subject to appellate review after the Association's voluntary dismissal of the action. (*Doverwood Townhome Owners Assn. v. McMullen* (July 31, 2002, B149685) [nonpub. opn.].)

In the prior appellate opinion, Division Two quoted with approval the trial court's following reasons for determining that McMullen had prevailed in the underlying action: Although the Association recovered the entire amount of McMullen's indebtedness, it did so through the private trustee's sale that

was completed by the time the complaint was served. Thereafter, the Association had no further claims against McMullen because there were no uncompensated damages. Nevertheless, Haycock continued the litigation for one year in order to ferret out information unrelated to the underlying action, such as the identity of the person who had threatened the trustee with litigation and to determine whether third persons might have a claim to the surplus funds that were deposited with the court in the interpleader action.

B. The Present Action for Malicious Prosecution

On September 15, 2003, McMullen filed the present malicious prosecution action against Haycock and the Association, which is no longer a party. McMullen alleged that: (1) Haycock had continued to prosecute the underlying complaint after it was rendered moot by the trustee's sale on January 18, 2000; (2) the underlying action had ended in McMullen's favor when the Association voluntarily dismissed the complaint with prejudice; (3) both the trial court and the appellate court had determined that McMullen was the prevailing party in the underlying action; and (4) Haycock had initiated and prosecuted the underlying action with malice. McMullen sought damages for emotional distress, lost wages, compensatory damages, punitive damages, attorney fees, and costs.

McMullen testified at trial that he was surprised by the breach of contract claim because, after the trustee's sale of his condominium, his debt had been paid in full. Similarly, McMullen was puzzled by the underlying quiet title claim because, after the trustee's sale, he no longer held title to the condominium. As for the underlying fraudulent transfer claim, McMullen was shocked because, until he was served with the complaint, he had no knowledge of the Gomez deed, which he did not sign, record, or deliver to Gomez.

McMullen testified that Haycock had maliciously attacked his character and professional reputation by falsely accusing him of feigning his stroke, violating his ethical obligations as an attorney, violating the law, filing fraudulent bankruptcy petitions, making false claims, engaging in criminal fraud, committing perjury, and conspiring to commit fraud. McMullen testified that as a result of Haycock's malicious conduct, he suffered emotional and physical distress from the injury to his personal and professional reputation and because of Haycock's references to reports to various authorities, including the State Bar. McMullen testified that he was embarrassed, upset, mortified, and depressed by the false accusations. He was so depressed by the false accusations that he was unable to seek employment. His blood pressure rose, he became agitated, he felt helpless, and was at wit's end.

The jury returned a verdict for McMullen and awarded him economic damages of $150,415.44 and

noneconomic damages of $250,000. Based on its finding by clear and convincing evidence that Haycock had acted with malice, oppression, or fraud, the jury awarded McMullen punitive damages of $150,000. The trial court entered judgment for McMullen (after subtracting the amount of the settlement with the Association) for $515,415.44 plus interest and costs.

DISCUSSION

I

Statute of Limitations

Haycock contends that the malicious prosecution complaint, which was filed on September 15, 2003, is barred by the statute of limitations. We disagree.

We shall assume, as Haycock contends, that McMullen's malicious prosecution claim accrued on January 12, 2001, when the Association voluntarily dismissed the underlying action with prejudice. At that time, the statute of limitations for malicious prosecution was codified in former section 340, subdivision (3)[2] (Stats. 1905, ch. 258, § 2, p. 232), which imposed a one-year limitations period "for injury to or for the death of one caused by the wrongful act or neglect of another." (See *Bellows v. Aliquot Associates, Inc.* (1994) 25 Cal.App.4th 426, 429-430.) In 2002, however, the Legislature amended former section

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[2] All further statutory references are to the Code of Civil Procedure.

340, subdivision (3) and deleted the relevant phrase "or for injury to or for the death of one caused by the wrongful act or neglect of another." That provision was moved to section 335.1, the newly enacted two-year limitations statute for actions for "injury to, or for the death of, an individual caused by the wrongful act or neglect of another."

While this appeal was pending, Division Two of this District held that the two-year limitations period of section 335.1 applies to malicious prosecution claims. (*Stavropoulos v. Superior Court* (2006) 141 Cal.App.4th 190.) We agree. Given that section 335.1 enlarged the limitations period of former section 340, subdivision (3), it applies to claims that were not time-barred when the statute took effect on January 1, 2003. (See *Mojica v. 4311 Wilshire* (2005) 131 Cal.App.4th 1069, 1072-1073.) We conclude that section 335.1's two-year limitations period applies to this case because, as we explain below, McMullen's claim was not yet barred by the one-year statute when the two-year statute took effect on January 1, 2003.

As McMullen points out, the limitations period was tolled from April 18, 2001, when the Association filed its notice of appeal in the underlying action, until November 22, 2002, when the remittitur was issued. (See *Bob Baker Enterprises, Inc. v. Chrysler Corp.* (1994) 30 Cal.App.4th 678, 683-684 [statute of limitations for malicious prosecution commences upon entry of judgment but is tolled when a notice of appeal is filed and resumes when the remittitur is issued].) Haycock argues, on the other hand, that the

limitations period was not tolled by the prior appeal because no appeal may be taken from the voluntary dismissal of an action. Although Haycock is correct that no appeal may be taken from the voluntary dismissal of an action, that is not the controlling factor. The controlling factor is whether it would be unfair to allow Haycock, who filed the prior appeal from the voluntary dismissal, to assert that the limitations period was not tolled by the prior appeal because no appeal may be taken from a voluntary dismissal. We conclude that such a result would be patently unfair. When Haycock filed the notice of appeal from the voluntary dismissal, he caused McMullen to believe that the limitations period was tolled while the appeal was pending. Haycock, accordingly, is equitably estopped to "'"plead the very delay caused by his course of conduct as a defense to the action when brought."' [Citations.]" (*Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 383.)

Applying the two-year limitations statute to the malicious prosecution claim that accrued on January 12, 2001, we conclude that McMullen timely filed the complaint on September 15, 2003, because the statute was tolled from April 18, 2001, when the Association filed the notice of appeal in the underlying action, until November 22, 2002, when the remittitur was issued.

II

Instructional Error

"A judgment may not be reversed for instructional error in a civil case 'unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.' (Cal. Const., art. VI, § 13.)" (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 580.) Haycock has failed to meet his burden of establishing that the trial court committed prejudicial instructional error.

A. Malice

With regard to Haycock's liability for malicious prosecution, the trial court instructed the jury on malice in accordance with *Albertson v. Raboff* (1956) 46 Cal.2d 375, 383, and *Sierra Club Foundation v. Graham* (1999) 72 Cal.App.4th 1135, 1156-1157.[3]

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[3] The trial court gave the following instruction on malice: "The malice element of the malicious prosecution tort relates to the defendant's subjective intent in initiating or continuing the prior action. It is not limited solely to actual hostility or ill will toward the plaintiff. Rather, malice is also present when proceedings are instituted or continued primarily for an improper purpose. Suits initiated or continued for an improper purpose are those in which: (1) the person initiating or continuing them does not believe that his claim may be held valid; (2) the proceedings are begun or continued primarily because of hostility or ill will; (3) the proceedings are initiated or continued solely for the purpose of depriving the person against whom they are initiated or continued of a beneficial use of his property; (4) the

(Continued on following page)

Haycock, who challenges neither the malice instruction nor the sufficiency of the evidence to support the jury's finding of malice, contends that the trial court nevertheless erroneously instructed the jury to find malice. The contention lacks merit.

Haycock argues that the trial court erroneously instructed the jury to find malice when it gave the following instructions on malicious prosecution: (1) CACI No. 1501, which informed the jury of the six elements of malicious prosecution;[4] (2) CACI No. 1503, which informed the jury of the trial court's legal conclusion that Haycock had continued the underlying lawsuit without probable cause;[5] and (3) CACI

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proceedings are initiated or continued for the purpose of forcing a settlement which has no relation to the merits of the claim."

[4] As modified, the CACI No. 1501 instruction given below stated: "Plaintiff claims that defendant wrongfully brought a lawsuit against him. To establish this claim, plaintiff must prove all of the following: [¶] 1. That defendant was actively involved in bringing or continuing the lawsuit; [¶] 2. That the lawsuit ended in plaintiff's favor; [¶] 3. That no reasonable person in defendant's circumstances would have continued to prosecute all three causes of action in the underlying complaint through the date that the underlying action was finally dismissed by defendant on January 12, 2001; [¶] 4. That defendant acted primarily for a purpose other than succeeding on the merits of the claim; [¶] 5. That plaintiff was harmed; and [¶] 6. That defendant's conduct was a substantial factor in causing plaintiff's harm."

[5] As modified, the CACI No. 1503 instruction given below stated: "Under the law, the Court decides whether defendant had reasonable grounds for continuing the lawsuit against plaintiff. [¶] I have decided that defendant did not have reasonable grounds for continuing the lawsuit against plaintiff."

No. 1504,[5] which informed the jury of the trial court's legal conclusion that the underlying lawsuit was resolved in McMullen's favor.

Haycock contends that because the trial court resolved two of the six elements of malicious prosecution – lack of probable cause and favorable termination – as legal issues, those two elements should have been deleted from the CACI No. 1501 instruction. In support of this contention, Haycock cites CACI No. 1501's "Directions for Use," which provide: "Do not read element #3 [probable cause] if the court has determined from undisputed facts that there was no probable cause" and "Do not read element #2 [favorable termination] if the court has determined that there was a favorable termination."

The elements of probable cause and favorable termination are decided by the court as legal issues if there are no disputed facts. (*Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 875; *Sierra Club Foundation v. Graham, supra,* 72 Cal.App.4th at p. 1149.) Although the jury had no role in deciding the elements of probable cause and favorable termination in this case because there were no disputed factual issues, Haycock has failed to show that he suffered any prejudice when the court informed the

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[5] As modified, the CACI No. 1504 instruction given below stated: "Under the law, the Court decides whether the earlier lawsuit ended in plaintiff's favor. [¶] I have decided that the earlier lawsuit ended in plaintiff's favor."

jury that lack of probable cause and favorable termination are among the elements of malicious prosecution.

Haycock also contends that the jury, having been informed of the trial court's legal determination that the underlying action was prosecuted without probable cause and had terminated in McMullen's favor, "was compelled to adopt this reason to find malice." Haycock points out that the jury was instructed to follow the law as stated by the trial court. Haycock argues that because the trial court instructed the jury that, as a matter of law, no reasonable person would have continued the underlying lawsuit, the jury was effectively directed to find that Haycock's subjective reasons for prosecuting the underlying action were malicious.

The contention lacks merit because the malice instruction, which Haycock does not challenge, correctly informed the jury that "[t]he malice element of the malicious prosecution tort relates to the defendant's *subjective* intent in initiating or continuing the prior action. . . ." (Emphasis added.) The trial court correctly defined lack of probable cause, the third element of the CACI No. 1501 instruction, by an *objective* standard, "[t]hat no reasonable person in defendant's circumstances would have continued to prosecute" the underlying action. It is well established that "[j]urors are presumed able to understand and correlate instructions and are further presumed to have followed the court's instructions. [Citation.]" (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.) We

will not assume, contrary to the applicable presumptions on appeal, that the jury misunderstood and misapplied the CACI No. 1501 instruction in determining the malice element of the malicious prosecution claim because: (1) the jury was not instructed to find malice; (2) Haycock has not challenged the instruction on malice that included factors other than lack of probable cause; and (3) Haycock has not challenged the sufficiency of the evidence to support the finding of malice.

B. Perjury

Haycock contends that the trial court erroneously refused to instruct the jury "that McMullen's perjury should be considered in deciding his 'lack of innocence' on the element of favorable termination." Haycock states that he "was entitled to an instruction that the trier of this element (Judge Rosenberg) would consider McMullen's perjury, and its perpetuation for a year – in deciding the element of 'favorable termination' under [*CACI*] *1504*." The contention lacks merit because the evidence did not support a finding that McMullen committed perjury.

Haycock argues that McMullen admitted at trial that he had committed perjury during discovery. During discovery, McMullen refused to admit that he had received no consideration for the Spencer Enterprises quitclaim deed. At trial, McMullen testified that his response was not untrue because: (1) there is no legal requirement that consideration must be

monetary; and (2) the consideration that he received for the Spencer Enterprises quitclaim deed was the delay of the trustee's sale. Moreover, Haycock does not argue that he defined the term "consideration" in the discovery request to mean only monetary consideration. We reject as unsupported Haycock's contention that McMullen's trial testimony contained an admission of perjury.

C. Unclean Hands

Haycock argues that the defense of unclean hands bars a plaintiff who commits misconduct, such as lying under oath at a deposition, from enjoying the fruits of his transgression. Haycock contends that the trial court erred in refusing "to instruct the jury that they could consider McMullen's perjury in deciding his lack of 'clean hands.'"[7] Haycock states that "[i]n addition to the perjury, McMullen refused to answer interrogatories until twice ordered by the court; refused to answer deposition qu[eri]es posed to him; refused Haycock's offers to meet and confer; and, refused to make application to the court for the surplus by truthfully admitting the conveyances to the bankruptcies were without consideration."

A party is entitled to request correct, nonargumentative instructions on every theory of the case

[7] We have granted Haycock's motion to take judicial notice of the instruction that was requested below and rejected by the trial court.

advanced by him that is supported by substantial evidence. (*Soule v. General Motors Corp., supra,* 8 Cal.4th at p. 572.) As we discussed above, however, the record fails to support a finding that McMullen committed perjury. In addition, regardless of whether the record contains evidence that might support findings that McMullen committed the other alleged misdeeds mentioned in the opening brief, those allegations have no relation to the issues raised in the underlying complaint, which were rendered moot by the trustee's sale.

III

Probable Cause and Favorable Termination

Haycock argues that because neither the cause of action for breach of contract nor the cause of action to quiet title was litigated in the underlying action, the trial court's ruling for McMullen on the elements of lack of probable cause and favorable termination must be reversed. We disagree. Whether the breach of contract and quiet title causes of action were litigated in the underlying action is irrelevant given the trial court's finding, which Haycock does not challenge on appeal, that the Association's claims in the underlying action were rendered moot by the January 18, 2000 trustee's sale. Thereafter, Haycock continued to litigate what were moot claims until the action was voluntarily dismissed on January 12, 2001. Haycock has failed to establish that the trial court's legal

determinations on the elements of lack of probable cause and favorable termination are erroneous.

IV

Prolonging the Underlying Lawsuit

Haycock contends that McMullen and his counsel unnecessarily prolonged the underlying lawsuit by: (1) failing to clarify whether the surplus funds from the trustee's sale should be paid to McMullen or third parties, including those named in the two quitclaim deeds purporting to convey his interest in the property; and (2) failing to request that the superior court release the deposited surplus funds. Given that the action was rendered moot by the January 18, 2000 trustee's sale, however, it was Haycock, and not McMullen, who unnecessarily prolonged the underlying lawsuit. Accordingly, Haycock's attempt to shift the blame to McMullen for Haycock's continued prosecution of a moot lawsuit must fail.

V

Causation

Haycock contends that the evidence is insufficient to support the finding that his actions were the cause of McMullen's emotional distress. We disagree. The evidence of emotional distress, which Haycock does not fully describe in his brief, amply supports the jury's finding of causation. Although we are not required to search the record (*Grand v. Griesinger*

(1958) 160 Cal.App.2d 397, 403 [if an appellant who challenges the sufficiency of the evidence fails to state fully, with transcript references, the evidence that is insufficient to support the findings, the appellate court has no obligation to conduct an independent review of the record]), we have found that it contains substantial evidence to support the jury's finding. McMullen testified that he was embarrassed, upset, mortified, and depressed by the false accusations to the point of being unable to seek employment because of his fear that others had seen the false accusations against him in public documents. Because of his distress, his blood pressure rose, he became agitated, he felt helpless, and was at wit's end.

DISPOSITION

The judgment is affirmed. McMullen is awarded his costs on appeal.

NOT TO BE PUBLISHED
IN THE OFFICIAL REPORTS

SUZUKAWA, J.

We concur:

EPSTEIN, P.J.

MANELLA, J.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DON HARDING HAYCOCK, Esquire, Plaintiff-Appellant, v. NORMAN L. EPSTEIN, Justice of the Second Appellate District; et al., Defendants-Appellees.	No. 08-56150 D.C. No. 2:08-cv-01531-FMC Central District of California, Los Angeles ORDER (Filed Feb. 11, 2010)

Before: GOODWIN, RYMER and CLIFTON, Circuit Judges.

The motion for rehearing is construed as a motion for reconsideration of the court's December 12, 2009 dispositive order.

So construed, the motion for reconsideration is denied. *See* 9th Cer. R. 27-10.

No further filings shall be accepted in this closed case.